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Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1940.

No. 549.

PUBLIC SERVICE COMMISSION OF THE STATE OF MISSOURI et al.,
Petitioners,

vs.

BRASHEAR FREIGHT LINES, INC., et al.,
Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI.

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REFERENCE TO OPINION BELOW.

The opinion of the Circuit Court of Appeals (R. 113) is reported as follows:

> Public Service Commission of the State of Missouri et al. v. Brashear Freight Lines, Inc., et al., Circuit Court of Appeals, Eighth Circuit, 114 Fed. (2d) 1 (Adv. Op.).

STATEMENT OF THE CASE.

In August, 1938, a three-judge court rendered a decree dismissing a counterclaim by petitioners against respondents. Ten months later, and in the second term thereafter, petitioners filed a so-called Motion for Damages in the three-judge court, seeking relief by way of counterclaim. This counterclaim had been asserted before as to thirty respondents and was first asserted in this motion as to forty-six respondents. The Court dismissed the motion on the ground that the subject matter and the relief prayed for in it had been theretofore ruled and finally determined in the cause.

Petitioners appealed to the Circuit Court of Appeals of the Eighth Circuit. That Court affirmed the action of the three-judge court with one judge dissenting. A motion filed by respondents in that court to dismiss the appeal was not ruled upon.

Petitioners now seek the aid of this Court on the ground that:

(1) There is no clear rule as to jurisdiction over counterclaims in cases under Section 266 of the Judicial Code.

(2) The Circuit Court of Appeals stated (though it did not follow) a rule concerning remitting such ancillary claims to the district judge. This rule is said to be in conflict with the authorities.

(3) The three-judge court erred in not hearing the counterclaim and deciding it in favor of petitioners as to statutory license fees and expenses of preparation for trial.

(4) The Circuit Court of Appeals misconceived the rationale of the action of the three-judge court in dismissing the counterclaim and the motion for damages.

Respondents deny that these contentions are valid or entitle petitioners to a writ of certiorari.

In order that the facts may more clearly appear, we set out a chronological table of pertinent record entries. This shows the terms of court within which respective entries were made.

OCTOBER TERM, 1937.

May 15, 1937. Bill filed (R. 2);

September 17, 1937. **Answer and counterclaim filed** (R. 44);

September 22, 1937. General denial to counterclaim filed (R. 46). (It was understood that if the issues of the counterclaim became pertinent after trial of the injunction issue, appellees should have the right "to attack the counterclaim for misjoinder, nonjoinder, multifariousness, timeliness, lack of jurisdiction in the statutory three-judge court, or otherwise.") See statement of appellees to supplement, appellants' statement of evidence (R. 85).

September 24, 1937. Partial hearing.

January 31, 1938. Hearing resumed and completed (R. 79).

MARCH 21, 1938, FIRST DAY OF MARCH TERM, 1938.

June 15, 1938. **Opinion of District Court** (R. 49);

July 2, 1938. Findings of fact and conclusions of law of District Court filed (R. 56);

July 26, 1938. **Amended answer and counterclaim of certain defendants LODGED with Court** (R. 63);

August 4, 1938. **Decree dismissing counterclaim** (R. 69);

September 3, 1938. Petition for rehearing and motion to modify decree filed (R. 71);

September 16, 1938. **Order** modifying decree, but nonetheless **dismissing counterclaim and overruling petition for rehearing** (R. 76).

OCTOBER 17, 1938, FIRST DAY OF OCTOBER TERM, 1938.

December 15, 1938. **Motion of certain defendants for "Costs" filed** (R. 84);

December 17, 1938. Statement of appellees, supplementing statement of evidence, filed and approved (R. 85);

December 21, 1938. Citation for appeal to United States Supreme Court filed in District Court Clerk's office;

February 13, 1938. Appeal dismissed by Supreme Court of United States (R. 87).

MARCH 20, 1939, FIRST DAY OF MARCH TERM, 1939.

April 24, 1939. Mandate of Supreme Court of United States filed (R. 87);

May 22, 1939. **Motion for damages filed** (R. 90);

July 5, 1939. Order overruling motion for damages on the ground the subject matter thereof "has heretofore been ruled and finally determined in this cause" (R. 94). This order formed the basis of the appeal to the Circuit Court of Appeals.

October 3, 1939. Notice of appeal (R. 1).

We have emphasized entries deemed important here.

An analysis of the motion for damages discloses two purported bases of relief. First, it reasserted the original counterclaim for license fees against thirty of the plaintiffs below. (However, the time for which the fees are sought to be collected is reduced from six years to the period subsequent to entry of the restraining order [Par. 3, R. 91]). Second, for the first time is asserted the right against the remaining forty-six plaintiffs below to collect license fees for certain types of operation under the statute (Par. 4, R. 91). The motion is limited, by its terms, to fees and taxes. This motion was filed before the three-judge court

after this Court held it had no jurisdiction of a direct appeal on the issue of the counterclaim, inasmuch as the constitutional question was out of the case. This was because respondents did not appeal the decree dismissing their bill. They had sought an injunction against the Public Service Commission, the Superintendent of Highway Patrol, and the Attorney General to prevent them from enforcing certain provisions of the 1931 Motor Bus and Truck Laws of Missouri (R. S. Mo. 1929, Sec. 5264 et seq.). The law subjected motor carriers to certain license fees graduated according to weight carrying capacity of the truck to be licensed. The Act also prescribed fees of 50 per cent of the maximum for operations within a twenty-mile zone and 33⅓ per cent within a ten-mile zone, respectively, within the State. The short run license provisions, prior to institution of the suit, had not been enforced. The bill did not seek to restrain the State Treasurer, nor was he made a party to the suit. Certain of the defendants below filed a counterclaim against thirty of the plaintiffs seeking to collect license fees allegedly due for a period of years (R. 44). To this a general denial was filed with the arrangement, as respondents understood, that they might plead further to it later if so advised.

The issues of the counterclaim were not tried with the issues of the bill. Upon the decision of the latter, the Court dismissed the counterclaim without prejudice to the rights of petitioners and the other defendants below to maintain an independent action or suit thereon if they, or either of them, should be so advised. The Court indicated doubt as to the right of the defendants to maintain such a counterclaim. After motion for rehearing was overruled, an appeal was taken to this Court, which was dismissed.

Then (we quote these facts from petition for writ of certiorari, page 3, adding, however, our own emphasis),

"after the Supreme Court, for want of jurisdiction, had dismissed the aforesaid direct appeal, taken from the adverse decree of the District Court on the counterclaim, **it was too late for defendants to appeal from such adverse ruling of the three-judge court on the counterclaim to the Circuit Court of Appeals.** They, therefore, conceive it to be proper to **incorporate the same subject matter of the counterclaim** pertaining to the loss of the license fees in a **motion for damages** against plaintiffs and the surety on their injunction bond."

The issues on this application appear to respondents to be somewhat obscured by the fact that petitioners have not confined their complaint to the action taken by the three-judge court on the motion for damages (and, of course, the action of the Circuit Court of Appeals with reference to this), but seek to test the action of the three-judge court on the original counterclaim. Such action was not before the Circuit Court of Appeals.

SUMMARY OF THE ARGUMENT.

I.

The matter in issue here is the action of the Circuit Court of Appeals in affirming the action of the three-judge court in overruling the motion for damages. The motion for damages is in reality a counterclaim previously relied upon as to thirty respondents and a counterclaim first asserted after decree and after the judgment term as to forty-six respondents. As to thirty respondents, the motion constituted an abortive petition for rehearing, which could be filed only during the judgment term.

Simkins' Fed. Practice, Revised Edition 1934, Sec. 874, p. 816;
Rules of Practice in Equity, Rule 69 then in effect;
McCrane v. U. S., 307 U. S. 61.

The Motion for Damages was not sworn to as required in the case of a petition for rehearing.

Rules of Practice in Equity, Rule 69;
Simkins' Fed. Practice, 1934, Sec. 873, p. 816.

Reassertion of a right denied by decree constitutes a collateral attack thereon, which is not permissible.

Grover v. Kirk, 187 Mo. App. 720.

As to the remaining forty-six respondents, the motion for the first time asserts relief by way of counterclaim after decree and judgment term. No authority exists for this.

Rules of Procedure for District Courts of the United States, Rule 13;
Rules of Practice in Equity, Rule 30.

The latter, then in force, provided that counterclaims should be stated in the answer.

The motion was ineffective in that it sought to assert substantive rights in the nature of a counterclaim in behalf of the Treasurer of the State of Missouri, not a party defendant in the bill and in no wise impleaded.

The three-judge court had jurisdiction in its discretion to decline to rerule on the subject matter of this motion for damages. It is not urged that the three-judge court had no such power. Instead, its action on the original counterclaim is attacked. As far as the record here goes, such action was not appealed from. Right or wrong, it is not here for consideration. Accordingly, the motion for damages is in effect a second petition for rehearing, filed more than ten days after decree and in the second term thereafter.

The granting of the writ of certiorari is discretionary and for situations similar to those dealt with in Rule 38.

Deputy v. DuPont, 308 U. S. 488, l. c. 500;
Magnum Import Co. v. Coty, 262 U. S. 159, l. c. 163.

II.

It is recognized that this Court may be disposed to deal with the motion for damages as if it were a counterclaim filed in due time. Such approach would enable petitioners to escape the effect of the untimeliness of their appeal to the Circuit Court of Appeals. Without waiving the point, and without inviting such consideration, respondents nonetheless deal with the issues thus presented.

(a) The rule is clear that the Court upon adjudication of an injunction or similar statute, has discretion as to whether or not it will entertain a motion for damages or similar ancillary matters.

Russell v. Farley, 105 U. S. 433;
United Motors Service v. Tropic-aire, 57 F. (2d) 479.

(b) 1. The opinion stated no erroneous rule. The opinion said that defendants' mistaken assumption as to jurisdiction in the Supreme Court led them to press the counterclaim before the three-judge court. It also qualified remarks concerning remission to the District Court from the three-judge court by indicating such might be done "upon presentation of the facts." Respondents did press their motion before the three-judge court and did not present to it any facts or request suggesting the alternative of remitting the matter to the District Judge.

2. Petitioners cannot complain that this "rule," as they call it, is at variance with various decisions referred to, inasmuch as the Court did not follow it.

(c) There is no authority for a petition for rehearing filed later than ten days after decree, or filed after the judgment term, and after one motion is overruled.

See Authorities under I.

There is no authority for a counterclaim first asserted after decree and after the judgment term.

See Authorities under I.

Petitioners cannot complain that damages and expenses were not allowed them, since none were asked in the motion for damages.

(d) The Court having once dealt with the counterclaim and overruled the petition for rehearing, could, and should, decline to entertain another petition for rehearing, or a reassertion of the counterclaim. After the three-judge court ruled on the counterclaim and overruled the petition for rehearing, and the term ended, petitioners' right was to appeal within ninety days. This is true whether the Court dismissed the counterclaim as a matter of discre-

tion, feeling the parties should go elsewhere to assert the subject matter, or whether the Court had doubt as to the right of any of the petitioners to maintain it.

(1) The counterclaim did not arise out of the transaction and could not have been the subject matter of an independent suit in equity.

Equity Rule 30;
Amer. Mills. v. Amer. Surety Co., 260 U. S. 360;
Powell v. U. S., 300 U. S. 276;
Eichholz v. Hargus, 23 Fed. Supp. 587.

(2) The State Treasurer alone can sue for the statutory fees.

R. S. Mo. 1929, Sec. 5272;
Eichholz v. Hargus, supra.

ARGUMENT.

I.

The Matter in Issue Here Is the Action of the Circuit Court of Appeals in Affirming That of the Three-Judge Court in Overruling the Motion for Damages. The Motion for Damages Is in Reality Reassertion of a Counterclaim Previously Denied as to Thirty Respondents and a Counterclaim First Asserted After Decree and After the Judgment Term as to Forty-six Respondents.

The three-judge court had jurisdiction in its discretion to decline to rerule on the subject matter of this motion for damages. It is not urged that the three-judge court had no such power. Instead, its action on the original counterclaim is attacked. As far as the record here goes, such action was not appealed from. Right or wrong, it is not here for consideration.

Petitioners lose sight of this fact, taking the position that the original counterclaim was before the Circuit Court of Appeals and is in the record for the consideration of this Court. Perhaps this is due to the fact that petitioners sought to use the expedient of a so-called motion for damages, filed ten months after the decree, and in the second term thereafter to afford the opportunity for a rehearing, and ultimately, to furnish the basis for appeal on the issues ruled in the counterclaim. They so state with commendable candor in the petition, page 3, which is quoted in the statement of facts.

The three-judge court acted on the subject matter of the counterclaim by dismissing it during the March Term, 1938. This action became final when the term ended. Ninety days after the overruling of the petition for rehearing, the time for appeal to the Circuit Court of Appeals elapsed. Not until the March Term, 1939, was the Motion

for Damages filed. The sole issue here is as to the propriety of the action of the three-judge court in overruling this motion, which attempted to reassert the same subject matter. At the time the three-judge court entered the decree dismissing the counterclaim on August 4, 1938 (after rendition of opinion, June 15, 1938), and entered the order overruling the petition for rehearing on September 16, 1938, in the March Term, 1938, the Equity Rules were in force.

McCrane v. U. S., 307 U. S. 61.

Petitioners' remedy then was by appeal from this order. At the close of the term thereafter, the Court had no further jurisdiction. Equity Rule 69 provided that a petition for rehearing should be filed at the judgment term. (See, also, Simkins' Fed. Practice, 1934 Ed., Secs. 873 and 874.) Even if the motion for damages could be considered as a petition for rehearing, it was inadequate for lack of verification.

Equity Rule 69;
Simkins' Fed. Practice, Sec. 873, p. 816.

Also a petition for rehearing should be filed at the judgment term.

Simkins' Fed. Practice, Sec. 874, p. 816;
Equity Rule 69.

The motion for damages, accordingly, amounts to nothing more than a collateral attack as to thirty respondents upon the decree dismissing the counterclaim, inasmuch as it reasserts a right denied by the decree.

Grover v. Kirk, 187 Mo. App. 720.

In so far as the motion for damages first presents a claim against the other forty-six respondents to collect license fees, it is an effort to assert a counterclaim after

decree and after close of the term at which it was rendered. The rules of procedure for the District Courts of the United States, Rule 13, or Rules of the Practice in Equity, Rule 30, neither present authority for such procedure. None is suggested by petitioners.

In view of the foregoing, it would appear that the action of the three-judge court on the motion for damages was so eminently correct as to leave the Circuit Court of Appeals no option but affirmance and as to form no adequate basis for an appeal by certiorari to the discretion of this Court.

Rule 38 of this Court presents the general type of situation in which it is contemplated that certiorari to the Circuit Court of Appeals may be granted. Overruling an effort again to litigate a matter previously presented and ruled on finally cannot be said to present a question of national importance. Petitioners have not shown any analogy with the suggestions of Supreme Court Rule 38, Pars. 5-a and b, indicating that there is a federal question of substance here not previously determined, or determined not in accordance with the decisions of this Court. A decree becomes final with the term. Consideration of the incidents of that doctrine presents no question of a type illustrated in Rule 38. We are pointed to no authority in petitioners' brief indicating to the contrary.

In Deputy v. Du Pont, 308 U. S. 488, in a dissenting opinion, Mr. Justice Roberts aptly says (l. c. 500):

> "The function of this Court is to resolve conflicts of decision and to settle important principles of law. The discretionary power of this Court to review judgments of lower federal courts was not intended to be exercised in every case where those courts have adjudicated the conflicting claims of the parties, which involves no important principle of law and no conflict of decision amongst the federal courts. Our rules

> adopted to carry out the policy of the statutes, granting the power to bring cases here by certiorari, have apprised the Bar and the public that we will not take cases fully heard and adjudicated below for the mere purpose of re-examining the correctness of the result. See Rule 38, Par. 5, 28 U. S. C. A., following Sec. 354."

In Magnum Import. Co. v. Coty, 262 U. S. 159, l. c. 163, it is said that a lack of uniformity of decisions forms the basis for the granting of writs of certiorari. There is no lack of uniformity in the attitude of courts toward the principle of not redeciding at a subsequent term a case once decided.

For these reasons we respectfully submit that this case does not present a question reviewable by this Court on certiorari.

II.

It is recognized that this Court may be disposed to deal with the motion for damages as if it were a counterclaim filed in due time. Such approach would enable petitioners to escape the effect of the untimeliness of their appeal to the Circuit Court of Appeals. Without waiving the point, and without inviting such consideration, respondents nonetheless deal with the issues thus presented.

(a) **The rule is clear that the Court upon adjudication of an injunction, has discretion as to whether or not it will entertain a motion for damages or similar ancillary matters.**

Russell v. Farley, 105 U. S. 433, is cited by petitioners. It holds that the Court issuing an injunction has the power to dispose of the incidents arising therein. That is precisely what the three-judge court did and what the Circuit Court

of Appeals affirmed. The opinion also established the fact that the Court has the **power** to order the incidents to be disposed of elsewhere. We quote from the same paragraph petitioners quoted, 105 U. S., l. c. 446:

> "**But whilst the Court may have** (we do not now undertake to decide that it has) **the power to assess the damages, yet if it has that power it is in its discretion to exercise it or to leave the parties to an action at law.** No doubt in many cases the latter course would be the more suitable and convenient one." (Emphasis ours.)

The case upholds the action of the three-judge court in all respects. The action of the Circuit Court of Appeals in affirming the ruling presents no conflict with Russell v. Farley.

Of course, the opinion, rendered in 1882, could not have envisioned the situation created by the passage of Section 266, Judicial Code (28 U. S. C. A. 380) years later.

Inland Steel Co. v. U. S., 306 U. S. 153, is cited. The foregoing comment on Russell v. Farley pertains to the Inland case as well.

The next case cited is United Motors Service v. Tropic-Aire, 57 Fed. (2d) 479. This case holds that the Court disposing of the main relief may hold the case and assess damages or relegate the parties to an action at law. The opinion quotes part of the opinion of Russell v. Farley, supra. The case is authority for the very action taken by the three-judge court in this case and affirmed by the appellate court. The counterclaim was dismissed without prejudice to the right of the parties to proceed elsewhere.

The same comment applies to Owl Creek Coal Co. v. Big Horn Collieries, 36 F. (2d) 485.

If the doctrine of the above cases is sound, and petitioners apparently so assert, they have no just complaint here.

At the bottom of page 14 of the argument, petitioners say:

> If the three-judge court must remit to the District Court, it had no authority to dismiss the motion for damages.
>
> If the dismissal be considered as the action of a one-judge court, it "acted in conflict with the uniform rule in all circuits permitting the court **in its discretion** to render judgment for damages * * *."

As to the first contention above, the matter is first urged here. Until the Circuit Court of Appeals had rendered its opinion, petitioners were satisfied to present their matters to the three-judge tribunal. When the decree of August 4, 1938 (R. 69), dismissed the counterclaim because inter alia it had not been presented, petitioners urged the three-judge court to take jurisdiction, contending that they had "urged or presented" the matter to that Court. Can petitioners invoke the jurisdiction of the three-judge court and urge a matter before it, and thereafter complain if the court adopts their view to the extent of entertaining jurisdiction?

As to the second contention, the Court in its discretion dismissed the counterclaim and motion for damages. It is not seen how such action can conflict "with the uniform rule permitting the Court in its discretion" so to render judgment.

Camp v. Boyd, 229 U. S. 530, next cited by petitioners, states a general rule in circumstances which present no analogy to the instant situation.

Pease v. Rathbun-Jones Engineering Co., 243 U. S. 273, is cited. It dealt with summary judgment against sureties on an appeal bond, and hence is not in point here. It does not hold that the Court may **not** remit the parties elsewhere for such relief.

On page 16 cases are cited in an effort to show that

three-judge courts may "retain jurisdiction to do complete justice." The first is Sterling v. Constantin, 287 U. S. 378. The case and the quotation have no bearing here. No counterclaim was involved. It holds that a three-judge court, having properly obtained jurisdiction under the statute, could deal with pertinent questions of law arising under the State Constitution and statutes, as well as under the federal law.

The second is Railroad Commission v. Pacific G. & E. Co., 302 U. S. 388. As the quotation indicates, this case holds that the three-judge court having jurisdiction was not confined to consideration of federal law, but could consider points of local law involved. There was no counterclaim.

The third case is Sovereign Camp v. Murphy, 17 Fed. Supp. 651. This was another case where the three-judge court, its jurisdiction properly invoked, had authority to try the entire case presented by plaintiff, including issues not involving constitutional questions.

We think these three cases shed no light on the situation here.

Next, on page 16, petitioners cite us to cases involving counterclaims.

Lehman v. Krentler etc. Co., 284 U. S. 448, was a contempt proceeding for violation of an injunction against patent infringement. The court was not a three-judge court. It was said that plaintiff, by bringing the suit, submitted to the jurisdiction of the court all issues embraced in the suit, including the counterclaim. That was no more than to say that in the instant case the three-judge court had authority and power to consider the counterclaim. It did so, and, in its discretion, dismissed the same.

The difference between the viewpoints of petitioners and respondents, apparently, is this: Respondents think the Court, in its discretion, acted wisely and correctly, and

without abuse thereof. Petitioners believe the Court should have acted the other way. This does not present the issue of the right of the three-judge court to deal with the subject matter. Petitioners really inveigh against the nature of its decision, rather than the fact that the Court undertook to render a decision.

Young Co. v. McNeal-Edwards Co., 283 U. S. 398, next cited, dealt with a Massachusetts statute concerning nonresidents bringing suit in that state. They were required to answer in an action brought by the opposite party involving the same subject matter. It was held that the Massachusetts statute was enforceable in the federal court. No counterclaim was involved. A separate suit was under consideration. This was not a three-judge case, nor was Chicago and Northwestern Ry. Co. v. Lindell, 281 U. S. 14, next cited. Furthermore, none of these cases presented the situation we have in the instant case, wherein none of the defendants was authorized to assert the matter set forth in the counterclaim.

Referring to the Eichholz case, 23 Fed. Supp. 587, petitioners imply that this case supports their view, that the three-judge court should have taken jurisdiction and decided the counterclaim.

The following excerpts show the attitude of the Court. We quote first from the minority opinion of Judge Otis, l. c. 599:

> "Defendants have asked leave to file a counterclaim. The plaintiff, it is alleged, owes the state fees for the use of the highways, which fees it has not paid. It is sought to recover them by this counterclaim. There are two reasons why I think the counterclaim should not be permitted to be filed, although I have little doubt that the fees sought are owing.
>
> "Equity Rule 30, 28 U. S. C. A., following section 723, authorizes (1) a counterclaim arising out of the

transaction which is the subject matter of the suit.' Also it authorizes (2) a 'counterclaim against the plaintiff which might be the subject of an independent suit in equity against him.' Two classes of counterclaims are thus provided for. Moore v. Cotton Exchange, 270 U. S. 593, 46 S. Ct. 367, 70 L. Ed. 750, 45 A. L. R. 1370. But obviously the counterclaim sought to be asserted here does not fall in class (2); it could not be made the subject of an independent suit in equity. (It might be made the subject of a suit at law.) Does it arise out of the transaction which is the subject matter of the suit?

"It is said in the opinion of the majority that it is doubtful if this counterclaim 'arose out of the transaction which is the subject matter of the suit.' I should go further in the same direction and say that it is certain the counterclaim does not arise out of the same transaction. What was 'the transaction' which is the subject matter of this suit?

"The Public Service Commission revoked or threatened to revoke the plaintiff's interstate permit and threatened then to prevent plaintiff operating without an interstate permit. The suit arises out of the withdrawal or threatened withdrawal of the permit and consequences incident to that withdrawal. The right to fees arises out of the use of the state's highways by plaintiff. Certainly the (a) withdrawal of the right to use the highways and (b) the use of the highways are not the same thing, not the same transaction. They are scarcely comparable, but, if comparable, they are not comparable as resembling one another, but as opposites.

"It is true that the plaintiff is operating under our temporary injunction. Because he is operating he owes fees. It may be said then that the counterclaim arises because of the injunction, and that the injunction arose from the threatened withdrawal of the interstate permit. That, however, is a connection quite remote between counterclaim and 'transaction' and not the immediate connection which the rule requires.

"My second reason for believing this counterclaim should not be entertained is this: If plaintiff owes fees for the use of the highways of the state he owes them to the state or to the state treasurer for the state. Sec. 5272, R. S. Mo. 1929, Mo. St. Ann., Sec. 5272, p. 6689. He does not owe them to the Public Service Commission whose members are the defendants in this case. Nor have I found any statute authorizing the Commission to sue for such fees as the agent of the state.

"In my view a permanent injunction should issue and leave to file the counterclaim should be denied."

Indeed, the majority opinion itself seems to conclude that the counterclaim is improper. It says (l. c. 593) (emphasis ours):

"Under Equity Rule 30, 28 U. S. C. A., following section 723, a defendant has a right to interpose a counterclaim 'arising out of the transaction which is the subject matter of the suit.' **It is doubtful whether these claims arose out of the transaction which is the subject matter of the suit, and yet, because of the injunction, the plaintiff elected to discontinue the payment of fees.**

"**No objection having been made to the filing of the counterclaim, this court will not interpose one under the circumstances of the case.** The question having been presented, it should be considered by us."

The counterclaim was not under consideration in the opinion of this Court in Frank Eichholz v. Public Service Commission, appearing at 306 U. S. 268.

To sum up, petitioners rely chiefly on Russell v. Farley, supra. That case holds that if the lower court has power to assess damages it is in its discretion to exercise it or leave the parties to an action at law. No doubt, in many cases the latter course would be more suitable and convenient.

In view of this case, petitioners' application here is un-

warranted. The case establishes a clear rule of discretion and the Circuit Court of Appeals has followed that rule.

(b) 1. **The opinion stated no erroneous rule.**

It is urged that the Circuit Court of Appeals stated an erroneous rule, to wit, that the three-judge court having discharged its constitutional function should remit the parties to the District Court for ancillary proceedings. If this be the rule, it has the qualifications referred to in the opinion. Facts should be presented entitling one to such remission. No motion was filed or oral application made presenting any facts, or seeking remission to the District Judge alone. On the contrary, petitioners pressed their matter for determination by the three-judge court. They cannot now be heard to deny jurisdiction in that court.

Pease v. Rathbun-Jones Engineering Co., 243 U. S. 273.

(b) 2. **Petitioners cannot complain that this rule is at variance with decisions referred to, inasmuch as the Court did not follow it.**

Petitioners go to some length to explain that this "rule," as they understand it, is at variance with the cases. If the rule conflicts with the cases, and is unsound, there is still no ground for petitioners to complain that the Circuit Court of Appeals did not follow the allegedly erroneous rule. It did not remit the parties to the District Court, but ruled that it had jurisdiction. The concluding lines of the opinion are:

> "But we do not decide that the three-judge court was without jurisdiction to enter its decree and order dismissing the supposed ancillary litigation. **It had such discretion and there was no abuse.**" (Emphasis supplied.)

(c) **The motion for damages is insufficient as a counter-claim, or as a petition for rehearing.**

This subject has been discussed under point I of the brief. To repeat that discussion would but serve to prolong the brief, in violation of the spirit of Rule 38 of this court.

It is urged that the three-judge court should have allowed damages or expenses of preparation for trial. The motion did not contain any reference to such elements, any facts concerning them, or any prayer seeking relief of this nature. It referred purely to "the amount of license fees" (R. 93).

Here it is apposite to state that an abortive motion for "costs" was filed December 15, 1938 (R. 84). This was out of time, being filed at a term subsequent to the judgment term. This was filed but by two of the defendants who sought expenses, witness fees and attorneys' fees. The matter was not pursued further. No action to this day has been undertaken or taken to appeal the action, or the lack of action, on the part of the three-judge court with reference to this matter. It stands abandoned.

R. S. 1919, Sec. 5272, clearly shows that only the State Treasurer could assert the right and authority to demand fees. In the entire law (Mo. Bus and Truck Law, Laws of Mo. 1931, p. 304, Sec. 5267-b et seq.) there is only one section that deals with the subject of who shall collect the fees. That is section 5272, which provides that motor carriers, upon receiving a certificate or permit, shall "pay to the State Treasurer of the State of Missouri the annual license fee as set out in this act for the maintenance and repair of the public highways."

A review of the various sections of the act shows that, when regulation and policing is under consideration, reference is made to the Public Service Commission and power is granted to it; when the payment of license fees is dealt

with, authority is specifically stated to be in the State Treasurer. Sections dealing with the power and authority of the Public Service Commission, one of the petitioners here, are absolutely silent as to any power to collect license fees.

Petitioners do not attempt to show authority in themselves to collect these fees. Because they have the right to police the motor carrier industry, they do not acquire the right to sue for statutory fees. The analogy is presented, for instance, of a police officer. He may arrest one and impound his automobile, for failure to have a statutory license, but the officer could not sue for and collect the license fee. The Police Court could fine a motorist for failure to have a licen but the judge of the police court could not sue for and collect the license fee.

In the original counterclaim, filed July 17, 1937, nothing was said about the Treasurer, or an effort to collect on his behalf, or on behalf of the State of Missouri (R. 90).

No authority is shown in any of the appellants to sue in behalf of someone else not a party to the record. If the State Treasurer has rights, no doubt he can assert them in proper proceedings.

In concluding their brief, petitioners refer to cases where the Supreme Court made an "appropriate ruling" saving appellants from improvident, direct appeals. That issue was not before the three-judge court and hence not before the Circuit Court of Appeals. Accordingly, it could not have been the basis of error, conflict or other improper action justifying application for certiorari.

What that argument amounts to is a plea by petitioners for a right of appellate review. They obtained that very right in the Eighth Circuit Court of Appeals. That Court decided the issue on its merits without reference to a motion filed by respondents to dismiss the appeal. Petitioners

cannot complain if appellate jurisdiction lies with the Circuit Court of Appeals, however much they might prefer to urge their contentions here.

Before concluding, two comments, not pertinent to the foregoing matters, appear necessary: On page 2 in the petition for certiorari it is said:

> "The defendants **timely filed** an amended answer and counterclaim (r. 63) * * *."

Nothing more is said about this matter. To avoid confusion, we point out this fact. It forms no basis of any relief sought here or elsewhere; also the amended answer and counterclaim was not "timely filed"; it was "LODGED" with the Court (R. 63) six weeks after the opinion was filed (R. 49), and over three weeks after the findings of fact were filed (R. 63). It was never filed with the clerk and no proceeding was ever brought to test the issue. The paper is not before this Court for consideration, never having been filed in the cause. Efforts to cause it to be filed were abandoned by inaction after lodging the paper with the clerk.

A second inadvertence appears on page 17. Petitioners in their brief say:

> "Believing that plaintiffs below would prosecute a direct appeal from the adverse ruling on the injunction," etc.

There was no ground for petitioners so to believe. The record shows respondents served no appeal papers. Petitioners' belief is outside of the record. It necessitates a similar excursion by respondents. Petitioners' counsel was informed of the intention of respondents not to appeal.

CONCLUSION.

We sum up the situation thus: The "Motion for Damages" was filed late. It is not a motion for damages at all, but a double counterclaim. The counterclaim does not arise out of the transaction, the subject of the main suit, and is not such as could be the subject of an independent action in equity. Part of the counterclaim covered matter previously asserted in a counterclaim, which was dismissed, and as to which action a petition for rehearing was overruled at a previous term. The other part of the counterclaim was first asserted after trial and judgment, and after close of the judgment term.

In the circumstances, it is believed that no ground for certiorari is disclosed or exists. Accordingly, we respectfully ask that certiorari be denied.

Respectfully submitted,

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